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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Supreme Court, U. S.
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NO. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION, THE HIBERNIA NATIONAL BANK IN NEW ORLEANS, GARNISHEE.

SUMTER D. MARKS, JR.
LOUIS B. CLAVERIE
PAUL M. HAYGOOD
PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS
Hibernia Bank Building
New Orleans, Louisiana 70112
Attorneys for The Hibernia National Bank in New Orleans

I. G. HAUSER, INC., "LEGAL PRINTERS", 100-A JEFFERSON HWY., N. O., LA. 70121

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OPINIONS BELOW

The opinion of the District Court is reported as a portion of the opinion of the Court of Appeals for the Fifth Circuit. The opinion of the Court of Appeals for the Fifth Circuit is reported at 450F.2d 419.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

When the Writ of Attachment and Garnishment Interrogatories were served on Hibernia, did Hibernia possess property of Fibrasa that was subject to attachment under the laws of Louisiana?

STATEMENT OF THE CASE

Petitioner herein, Sisalcords Do Brasil, Ltd., (hereinafeter "Sisalcords") on March 20, 1970, filed in the Civil District Court for the Parish of Orleans, State of Louisiana, in Civil Action No. 505-646, a "Petition for Recognition and Execution of Foreign Judgment and Writ of Attachment". The petition sought recognition of a New York judgment entered by default on September 15, 1969, against Fiacao Brasileira de Sisal, S.A., respondent in opposition herein (hereinafter "Fibrasa"), in the amount of $218,154.59. In addition, Sisalcords prayed that the court appoint an attorney at law to represent Fibrasa, Fibrasa being a Brazilian corporation with its sole place of business located in João Pessoa, Paraiba, Brazil; that a writ of attachment issue commanding the Sheriff of the Parish of Orleans to seize and attach all property of Fibrasa found within the jurisdiction of the Civil District Court, Parish of Orleans; and that The Hibernia National Bank in New Orleans, respondent in opposition herein (hereinafter "Hibernia"), be made garnishee. Service of the writ of attachment and garnishment interrogatories was made on Hibernia on March 20, 1970; subsequent to the filing of the petition herein; and on April 7, 1970, Fibrasa removed the action pending in the Civil District Court, Parish of Orleans, State of Louisiana, to the United States District Court for the Eastern District of Louisiana.

On May 4, 1970, Hibernia filed its answer to the garnishment interrogatories served on it. It answered said

interrogatories as follows:

QUESTION:

"Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories, or at any time since, any money, rights, credits, letters of credit, or other property whatsoever, belonging or due to Fiacao Brasileira De Sisal, S.A., defendant, or in which it has or had any interest for the whole or for a part, either direct or indirect, legal or equitable; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said judgment rendered by the Supreme Court of New York in the amount of $218,154.59, or if less, to what amount?—you being asked and required to make a full disclosure in relation to the same."

ANSWER:

"Answering interrogatory No. 1, garnishee answers no, it did not have in its hands, or under its control, directly or indirectly, at the time of service of the interrogatories herein, or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to Fiacao Brasileira De Sisal, S.A., defendant, or in which it has or had any interest for the whole or for a part, either direct or indirect, legal or equitable. Garnishee did, on February 9, 1970, establish Irrevocable Letter of Credit No. 24349 and did, on March 6, 1970, establish Irrevocable Letter of Credit No. 24381 for the account of Twi-Ro-Pa Mills Agency, Inc., New Orleans, Louisiana in favor of FIBRASA, Fiacao Brasileira de Sisal, S.A., (hereinafter referred to as "Fibrasa") copies of which letters of credit are attached hereto as Exhibits A and

B, respectively. However, at the time of service on garnishee on March 20, 1970, no sums were due under the aforesaid letters of credit.

Subsequent to service of the attachment herein on garnishee, garnishee received from Banco Do Brasil, S.A. three drafts drawn by Fibrasa against the aforesaid letter of credit No. 24349, dated February 9, 1970, payable to the order of Banco Do Brasil, S.A., with attached bills of lading and other documents in accordance with the terms of the aforesaid letter of credit. Such drafts were the property of Banco Do Brasil, S.A., and Fibrasa had no interest or property right, direct or indirect, in such drafts, Banco Do Brasil, S.A., being the unconditional owner thereof. In accordance with the terms of the aforesaid letter of credit, garnishee released the bills of lading to Twi-Ro-Pa Mills Agency, Inc., and remitted the proceeds of the drafts in accordance with the instructions of Banco Do Brasil, S.A."

QUESTION:

"Were you, at the time of service upon you of these interrogatories, or since, directly or indirectly, legally or equitably, indebted or obligated unto the said defendant or (*sic*) anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become (*sic*) direct or indirect, legal or equitable, or be for the whole or a part only or whether it be by bill, note, letter of credit or otherwise; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full

amount of said writ and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same."

ANSWER:

"Answering interrogatory No. 2, garnishee says no. See garnishee's answer to interrogatory No. 1."

QUESTION:

"Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, legally or equitably, unto or with the said defendant or his agent any payment or innovation or compromise, or arrangement or given defendant or his agent any note or written obligation or credit or payment or received from him directly or indirectly any receipt or acquittance?—and if yes, state the nature, description and amount thereof, and the time, place and circumstances of the same."

ANSWER:

"Answering interrogatory No. 3, garnishee answers no. See garnishee's answer to interrogatory No. 1."

The letters of credit to which reference was made by Hibernia in its answer to the garnishment interrogatories provided that drafts "drawn under and in compliance with the terms of this Credit" would be honored "on presentation and delivery of the documents as specified at The Hibernia National Bank in New Orleans, New Orleans, La." The documents required included detailed invoices stating that the invoices covered specified twine in accordance with prices and other requirements listed in the letter of credit, test and specification certificates issued by Fibrasa certifying that the twine conformed to certain specifications, and full sets of clean, on

board ocean bills of lading issued to the order of the Hibernia "Notify Twi-Ro-Pa Mills Agency, Inc." and dated not later than specified dates. The letters of credit were established for the account of Twi-Ro-Pa Mills Agency, Inc., the Hibernia's customer, and addressed to Fibrasa.

Subsequent to Hibernia's filing its answer to the garnishment interrogatories, Fibrasa filed, on May 5, 1970, a motion to dismiss for lack of jurisdiction. Two days later, the answer of Hibernia to the garnishment interrogatories was served on Sisalcords by the United States Marshal, which answer was never traversed by Sisalcords. Then, as all parties concede, on May 26, 1970, the New York courts set aside the judgment on which Sisalcords based its March 20, 1970 petition.

In the meantime, on May 1, 1970, Letter of Credit Number 24381 expired; and, on May 25, 1970, Letter of Credit Number 24349, against which were drawn the drafts to which reference was made in Hibernia's answer to the garnishment interrogatories, expired.

On July 10, 1970, Sisalcords filed a "Supplemental and Amended Complaint" in the United States District Court for the Eastern District of Louisiana submitting an "alternative cause of action to the complaint originally filed". On August 5, 1970, Fibrasa once again moved to dismiss for lack of jurisdiction; and on March 30, 1971, a minute entry dated March 29, 1971, was entered granting Fibrasa's motion to dismiss for lack of jurisdiction. In its Memorandum Opinion, also filed on March 30, 1971, the District Court concluded that there was no property of Fibrasa subject to siezure and hence that Sisalcords obtained no jurisdiction by the service of its writ of attachment. The judgment of the District Court was affirmed, *per curium*, *Sisalcords Do Brasil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450F.2d 419 (5th Cir. 1971), and

petitions for rehearing and rehearing en banc were denied. F.2d , (5th Cir. 1971). Petitioner has filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

May It Please the Court:

I.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS ARE CORRECT AS A MATTER OF LOUISIANA LAW.

It is clear that there is no liability on the part of a bank issuing a letter of credit in the absence of strict compliance with the terms of the letter of credit. *Venizelos, S.A. v. Chase Manhatten Bank*, 425 F. 2d 461, 465 (2d Cir. 1970). See also, e.g., *Lamborn v. National Bank of Commerce*, 276 U.S. 469, 48 S. Ct. 378, 72 L. Ed. 657 (1928); *Old Colony Trust Co. v. Lawyers' Title & Trust Co.*, 297 F. 152 (2d Cir.), *cert. denied*, 265 U.S. 585, 44 S. Ct. 459, 68 L. Ed. 1192 (1924); *North Woods Paper Mills v. National City Bank*, 121 N.Y.S.2d 543 (1953), aff'd, 283 App. Div. 731, 127 N.Y.S.2d 663 (1954).

The letters of credit in the case at bar required *presentation* and *delivery* to Hibernia of certain clearly-specified drafts, invoices, certificates and bills of lading before Hibernia was obligated to pay anyone pursuant to the letters of credit. It is undisputed that, at the time service on Hibernia was made, no such drafts, invoices, certificates and bills of lading had been delivered to Hibernia. Despite the suggestion of Sisalcords that the conditions of the letters of credit had been met at the time the seizure was attempted, the District Court and Court of Appeals correctly concluded that there was no obligation of

Hibernia under the letters of credit at the time of service of the writ of attachment and garnishment interrogatories because the necessary documents had not been *presented* and *delivered* to Hibernia in accordance with the terms of the letters of credit. Therefore, *no one* had any right to be paid under the letters of credit when service of the attachment and garnishment interrogatories was made on Hibernia. Indeed, even if Fibrasa itself had appeared at Hibernia and demanded payment under the letters of credit, Hibernia would have been under no obligation, and indeed would have had no right, to make any payment to Fibrasa in the absence of its presenting the documents required by the letters of credit. It is, therefore, abundantly clear that Hibernia held no property of Fibrasa and was not indebted to Fibrasa at the time the writ of attachment and the garnishment interrogatories were served upon Hibernia.

The only right that Fibrasa could be said to have had under the letters of credit, when the interrogatories were served upon Hibernia, was the inchoate and wholly contingent right to receive the payment of funds at a future time and prior to the expiration of the letters of credit upon then strictly complying with the requirements of those letters of credit. This kind of uncertain contingent future right, in the absence of statutory provisions to the contrary, [e.g., wage garnishments, see La. R.S. 13:3921 et seq. (1950)], is not subject to garnishment under the law of Louisiana. *Silverman v. Grinnell*, 165 La. 587, 115 So. 789 (1928); *Maduel v. Mosseaux*, 29 La. Ann. 228 (1877); *Smith v. Tooke*, 120 So. 651 (La. App. 2d Cir. 1929). See also *First National Bank of Natchez v. A. Moss & Co.*, 41 La. Ann. 227, 6 So. 25 (1889); *Denegre v. George Milne & Co.*, 10 La. Ann. 324 (1855); *Blanchard v. Grousset*, 1 La. Ann. 96 (1846).

As the District Court correctly concluded:

> "Under Louisiana law the efficacy of an attachment is determined according to the facts existing at the date of the issuance of the writ and, if defective, it is not cured by subsequent events. *Anisman v. Nagle*, 177 La. 583, 148 So. 885 (1933) and cases cited therein; *Forbess v. George Morgan Pontiac Co.*, 135 So. 2d 594 (1961). As of the date on which the writ and interrogatories were served, Hibernia had no funds in its possession which belonged to Fibrasa nor did it have an absolute liability to Fibrasa under the letter of credit." (Footnote omitted).

Service of the writ of attachment and of the garnishment interrogatories on Hibernia, therefore, effected no seizure of any property of Fibrasa. See, *e.g.*, *Coleman v. Fennimore*, 16 La. Ann. 253 (1861), in which the Louisiana Supreme Court held that a judgment against a garnishee could not be sustained where the only indebtedness of the garnishee to the defendant, at the time of the attachment, consisted of payments under a contract that might or might not be completed and that might or might not, therefore, be due. Similarly, in the case at bar, at the time the writ of attachment and the garnishment interrogatories were served on Hibernia, the only obligation of Hibernia to Fibrasa, if any, was pursuant to the two letters of credit whose conditions might or might not be met in the future. As stated by the Louisiana Supreme Court in *Maduel v. Mosseaux*, *supra*, "The true test [of whether there is property of the defendant subject to seizure] is, what could the debtor recover of the garnishee at the date of the service [of the garnishment interrogatories]?" 29 La. Ann. at 231. Inasmuch as the conditions of the letters of credit had not been satisfied at such time, clearly no one could have obtained anything from the garnishee, Hibernia, at the date of service. Hence, under the test established by the Louisiana Supreme Court in the *Maduel* case, there was no valid seizure of any property of Fibrasa as a result of service on Hibernia of the writ of attachment and

garnishment interrogatories. Thus, it is clear that Louisiana law clearly supports the conclusion of the District Court and the Court of Appeals in this diversity case that, as a matter of Louisiana law, no valid seizure of Fibrasa's property was made and that, therefore, there is no jurisdiction over Fibrasa, the nonresident defendant. The *Ericksson* case, a New York case cited by petitioner, even if relevant in a Louisiana diversity case such as the one at bar, is clearly distinguishable, since in the *Ericksson* case seizure was made *after* presentation of all of the documents required by the letter of credit. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

II.

THE DECISION OF THE COURT OF APPEALS CREATES NO CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner contends that there is a conflict between the decision of the Court of Appeals for the Fifth Circuit in this matter and the decision of the Court of Appeals for the Second Circuit in *Venizelos v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). In making such a contention, petitioner suggests that such a conflict exists because the decision of the Fifth Circuit "is to the effect that even though there had been performance by the beneficiary, there was still no obligation on the part of the bank." (Brief of petitioner at p. 13).

Such a contention assumes the basic conclusion that there was performance of the obligations under the letters of credit prior to the seizure. As we have previously shown, and as the District Court and Court of Appeals correctly concluded, there

was no such performance since the required presentation and delivery of documents did not occur prior to the seizure. Moreover, even if such a conflict did exist, it would be a conflict between two Courts of Appeals applying the substantive law of two separate states and, as such, not the type of conflicts between the circuits that requires resolution by this Court. Obviously there will be conflicting rules of law announced by different Courts of Appeals when such Courts are applying the law of different states. Such conflicts are the natural result of our federal system in which the substantive law of one state may differ from that of another, and the resolution of such conflicts is neither desirable nor allowable under the rule laid down by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

III.

IMPORTANT POLICY CONSIDERATIONS SUPPORT THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS.

Petitioner argues that important social and commercial considerations require reversal of the decisions below. We respectfully submit that, under the doctrine of *Erie Railroad Co. v. Tomkins, supra,* the decisions below must be affirmed as correct applications of the law of Louisiana. Moreover, even if policy considerations of the federal courts are relevant to a determination of state substantive issues in a matter in the federal courts only as a result of diversity jurisdiction, such policy considerations weigh heavily in favor of affirming the decisions below. Petitioner itself in its brief to the Court of Appeals recognized that:

"If this Honorable Court holds for plaintiff, financial

> institutions will decry such a decision as judicial "intervention" in the otherwise relatively immune commercial world of international transactions; bankers would assail the new imposition on the sanctity of international paper; relations with foreign banks would be strained; the entire letter of credit system would be assaulted."

The reason for such a potential result is obvious: foreign shippers would be unable to obtain financing for shipments into the United States, because foreign banks would be unwilling to take the risk that contingent credits made available to such foreign shippers, or holders of their drafts, might be subject to seizure before such drafts are presented for payment under the letter of credit. The implications of such a result are enormous, and its potential effects catastrophic. In the absence of clear authority under the law of Louisiana requiring such a result to be reached, which is not present in this case, we submit that, as a matter of policy, such a course of action should be rejected.

Petitioner argues that affirming the judgment of the District Court and the Court of Appeals would require petitioner and others doing business with foreign corporations to sue their foreign customers in foreign courts. This obviously would not be true in many cases, as such foreign customers often have assets available for seizure within the United States. However, even if companies such as petitioner are forced to pursue their claims in foreign courts, such companies obviously take that risk when they elect to do business with a corporation located in a foreign country. In the case at bar, petitioner, having elected to take that risk, now seeks to avoid the burden of pursuing Fibrasa in Brazil by urging a construction of the law of Louisiana with respect to attachment that, we submit, clearly

has no support under Louisiana law. Indeed, as we have previously shown, the law of Louisiana is to the contrary. Hibernia, in making partial payment under one of the letters of credit, obviously acted in reliance on the clear law of Louisiana that no property of Fibrasa was attached under the circumstances of the case at bar. It would, therefore, be inequity of the greatest sort for this Court to reverse the District Court and the Court of Appeals and, in effect, impose liability on the innocent third party herein, Hibernia, in an effort to provide recourse to a corporation that chose to do business with a company that it knew to be located in Brazil. Under *Erie* such a result must be rejected and the petition for a writ of certiorari denied.

Finally, besides the fact that the law of Louisiana and policy considerations support the decisions below, and that there is no conflict between the decisions of Courts of Appeals for the Second and Fifth Circuits, we respectfully submit that logic also supports the decisions below and the denial of a writ of certiorari. How can an attaching creditor ever obtain funds from a garnishee bank that has issued a letter of credit? The garnishee bank may not, under the terms of the letter of credit, pay out any funds under such letter of credit, to the attaching creditor or anyone else, until the bank has obtained all of the necessary bills of lading, drafts and other documents required by its letter of credit. The drafts drawn under a letter of credit make the delivery to the bank of the attached bills of lading and other documents conditioned upon the payment by the bank of the amount of the draft. Unless payment of the draft is made by the bank, the bank cannot obtain the bills of lading and other documents attached thereto. If contingent rights to future payments under a letter of credit were held to be subject to seizure, as petitioner contends, a bank, once served with a writ

of attachment and garnishment interrogatories, could never pay out funds under the letter of credit and could never, therefore, obtain the bills of lading. However, unless the bank obtains such bills of lading it has no right under the letter of credit to pay out any funds to anyone, including the seizing creditor, and, therefore, the letter of credit would merely expire at the end of its effective term. Nothing would ever be due any seizing creditor and nothing would have been seized under the attachment. To express it somewhat differently, under the bank's obligation to its customer, the bank is not to make payments under the letter of credit until the bank acquires the bills of lading and other documents specified in the letter of credit. On the other hand, the one presenting the draft to the bank will release to the bank the bills of lading and other documents only upon payment to it of the amount of the draft drawn under the letter of credit. Obviously, therefore, an impasse is reached. This means that the bank would never be under any obligation to pay out anything under the letter of credit to anyone. The letter of credit would, therefore, expire by its terms as a wholly worthless piece of paper without payment either to a seizing creditor or to anyone else.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Sumter D. Marks, Jr.,
Louis B. Claverie
and
Paul M. Haygood
of

Phelps, Dunbar, Marks,
Claverie & Sims
Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: 529-1311

Attorneys for The Hibernia
National Bank in New Orleans

CERTIFICATE

I hereby certify that three copies of the above and foregoing brief have been served upon Harold R. Ainsworth, Esquire, 2307 American Bank Building, New Orleans, Louisiana, 70130; and William A. Porteous, III, Esquire, 925 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the U.S. Mail, postage prepaid, properly addressed, this day of April, 1972. I further certify that all parties required to be served have been served.